Supreme Court, U.S.
FILED

97 1078 DEC 23 1997

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

CATHERINE A. GHIGLIERI, TEXAS BANKING COMMISSIONER,

Petitioner

v.

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY;
SUN WORLD NATIONAL ASSOCIATION, EL PASO, TEXAS; AND
COMMERCIAL NATIONAL BANK OF TEXARKANA,

Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Case Nos. 96-50847 and 96-10818

PETITIONER'S APPENDIX VOLUME I

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

LAQUITA HAMILTON
Deputy Attorney General

DAVID MATTAX
Assistant Attorney General

D'ANN JOHNSON
Counsel of Record
Special Assistant Attorney General
2601 North Lamar Boulevard
Austin, Texas 78705-4294
(512) 475-1327

STEVEN A. FLECKMAN
JULIA B. KENNER
Fleckman & McGlynn
1800 NationsBank Tower
Congress Avenue
Austin, Texas 78701

79 pp

TABLE OF CONTENTS
APPENDIX

A. *Ghiglieri v. Sun World National Association*, Opinion of the United States Court of Appeals for the Fifth Circuit, Case Nos. 96-50847, 96-50948 (July 22, 1997).

B. *Ghiglieri v. Ludwig*, Opinion of the United States Court of Appeals for the Fifth Circuit, Case No. 96-10818 (October 29, 1997).

C. *Ghiglieri v. Sun World National Association*, Memorandum Opinion and Order, United States District Court for the Northern District of Texas (October 29, 1996).

D. *Ghiglieri v. Ludwig*, Findings of Fact and Conclusions of Law of the United States District Court for the Western District of Texas (May 22, 1996).

E. Decision of the Office of the Comptroller of the Currency on the Applications of Sun World, National Association, El Paso, Texas (August 2, 1996).

F. Decision of the Office of the Comptroller of the Currency on the Applications of Commercial National Bank of Texarkana, Texarkana, Arkansas (March 8, 1995).

G. Denial of Petition for Rehearing and Suggestion for Rehearing En Banc, United States Court of Appeals for the Fifth Circuit (September 25, 1997).

H. 12 U.S.C. § 36.

I. ARK. CODE ANN. § 23-32-1202 (Michie 1994).

J. N.M. STAT. ANN. § § 58-1C-4, 58-1C-5, 58-1C-6, 58-1C-7, 58-1C-8 (1996).

K. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, [H.R. 3841] (later, Pub. L. No. 103-328, 108 Stat. 2338 (September 29, 1994)).

L. Joint Explanatory Statement of the Committee of Conference, H.R. CONF. REP. NO. 651, 103d Cong., 2d Sess. 47 *et seq.* (Aug. 2, 1994).

M. Prepared Statement of Chairman D'Amato before Financial Institutions Subcommittee (May 1, 1997).

N. Affidavit of James J. Saxon.

United States Court of Appeals,
Fifth Circuit.
United States Court of Appeals,
Fifth Circuit.
Nos. 96-50847, 96-50948

Catherine A. GHIGLIERI, in her official capacity
as Texas Banking Commissioner,
Plaintiff -Appellee,

v.

SUN WORLD NATIONAL ASSOCIATION,
El Paso, Texas, et al.,
Defendants,

Sun World National Association,
El Paso, Texas;
Eugene A.Ludwig, in his official capacity as
United States Comptroller of the Currency,
Defendants-Appellants.

July 22, 1997

Appeals from the United States District Court for the Western District of Texas.

Before JOLLY, DUHÉ, and EMILIO M. GARZA, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

The Comptroller of the Currency (the "Comptroller") allowed Sun World, National Association ("Sun World") to relocate its main banking office across a state line form Texas to New Mexico. Notwithstanding that Sun World's principal office would now be in New Mexico, the Comptroller further allowed Sun World to maintain its pre-existing branches in Texas, and to establish a new branch in Texas. The Texas Banking Commissioner (the "Commissioner") had other notions and persuaded the district court to enjoin both Sun World and the Comptroller. Sun World and the Comptroller appeal, seeking to have the Comptroller's decision to allow Sun World to operate in both New Mexico and Texas reinstated. The appeal presents a question of statutory interpretation and because the Comptroller's interpretation of the statute he administers is reasonable, we defer to it. We grant the relief requested, vacate the judgment of the district court, and remand for entry of judgment in favor of the Comptroller.

I

A

Sun World is a national banking association that had its main office in El Paso, Texas. In addition to its main office, Sun World operated two branch banks in El Paso.

Sun World decided to move its main office from El Paso, Texas, to Santa Teresa, New Mexico, a distance of less than five miles. To achieve this end, Sun World submitted two applications to the Comptroller in 1996. The first application sought approval to move the main office from Texas to New Mexico and to maintain the pre-existing branches in Texas. The second application sought authorization to establish a new branch at the location of the former main office in Texas. The Commissioner objected to both applications. The Comptroller subsequently approved both applications, and Sun World operated in both states until enjoined by the district court.

B

The Commissioner filed this action in the district court(1) seeking to have the decision of the Comptroller set aside, to have Sun World enjoined from conducting interstate banking operations and to have the Comptroller enjoined from approving any further applications of this type.

All parties filed motions for summary judgment. The district court heard arguments on the motions and granted the Commissioner's motion. The court rejected the Commissioner's argument that Sun World could not relocate its main office across a state line. The court, however, held that Sun World could not retain its Texas branches following relocation to New Mexico and that, consequently, neither could Sun World establish a new branch at the site of its former main office in Texas. Sun World and the Comptroller appeal.

II

A

Resolution of this appeal requires us to examine the provisions of and the interplay between two sections of a federal statute. (2) Section 30 effectively provides that Sun World can change the location of its main office to any location within thirty miles of El Paso upon the approval of the Comptroller and two-thirds of it shareholders. (One paragraph of the section relates specifically to the retention of branches after an interstate move, but is irrelevant to our case because it is applicable only to moves occurring after May 31, 1997.) Section 36 sets forth the requirements for the establishment of new branch banks. (Two paragraphs of § 36, which provide specific guidelines for the retention of branch banks upon relocation of a main branch across state lines, are also effective only with respect to banks relocating after May 31, 1997, and therefore inapplicable to this case.)

The Comptroller determined that under § 30 Sun World could relocate its main branch to New Mexico. The Comptroller further determined that because the move occurred before June 1, 1997, Sun World could retain its existing branches in Texas. The Comptroller then decided that § 36 authorized Sun World to create a new branch at the site of the former main office. The district court disagreed. It held that, although Sun World could move its main office to New Mexico under § 30(b), (3) it could not continue to operate the branches remaining in Texas. This conclusion--that Sun World could exist only in New Mexico--necessarily led to the holding that a new branch could not be established in Texas because such branching was not permitted under New Mexico banking law. We now turn to the task of resolving the questions of statutory interpretation posed by this appeal.

B

(1)

In this action, the Commissioner challenges the Comptroller's decision pursuant to the Administrative Procedures Act; we therefore review the decision of the Comptroller de novo to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see Louisiana Envtl. Soc'y v. Dole, 707 F.2d 116, 119 (5th Cir. 1983).

The Supreme Court has set out the analysis to be applied in reviewing an agency's interpretation of the statute it administers. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 841-43, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). Chevron's analysis applies to the case before us because the Comptroller is charged with the administration of the banking laws at issue. Smiley v. Citibank (South Dakota), N.A., --- U.S. ----, ----, 116 S.Ct. 1730, 1732, 135 L.Ed.2d 25 (1996). The Supreme Court instructed as follows:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron at 842-43, 104 S.Ct. at 2781-82. In reaching a determination whether Congress has spoken directly on an issue, courts are free to consider both the plain language and meaning of the statute and any pertinent legislative history. Doyle v. Shalala, 62 F.3d 740, 745 (5th Cir. 1995). The court should use traditional tools of statutory construction, and if the court can discern that Congress intended to address the precise question, then that intention must be given effect. Chevron at 843 n. 9, 104 S.Ct. at 2781 n. 9. If, however, the statute is silent on the precise issue then the agency's interpretation should be given "controlling weight." See NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 255-59, 115 S.Ct. 810, 813-14, 130 L.Ed.2d 740 (1995). In such a case, the issue before the court "is not whether [the agency's interpretation] represents the best interpretation of the statute, but whether it represents a reasonable one." (4) Smiley, at ----, 116 S.Ct. at 1735.

We now apply these principles of construction to the statutes before us today.

(2)

(a)

First, we address whether, upon relocation of its main office to New Mexico, Sun World was permitted to retain its pre-existing branches in Texas. We initially look to the statute. The authority for the relocation of Sun World's main office from El Paso to Santa Teresa is § 30(b). The only relevant restrictions imposed by that section are that the new site be within thirty miles of the original site, and that bank obtain the approval of the shareholders holding at least two-thirds of its stock and that a certificate of approval issue from the Comptroller.

Thus, the Comptroller argues that because there is no statutory language requiring divestiture of existing branches upon relocation of the main office the statute is clear on this issue. He argues that the absence of any such requirement indicates that Congress did not intend to affect the retention of branch banks upon relocation of the bank's main office. The Commissioner counters that the operation of branches--in all situations--is governed solely by § 36, and argues that there is no authority found in § 36 that would allow Sun World to retain its pre-existing branches upon relocation.

Neither party persuades us that Congress has clearly spoken to the precise issue before us today. Indeed it is plain, we think, that the statute is silent on this point. It is obvious that § 30 does not speak to the question of retention of branches after relocation. Although § 36 addresses branch banking, it fails completely to speak to the retention of branches upon relocation of the bank's main office. Section 36(a) speaks only to retention of branches owned in 1927, 36(b) speaks only to the retention of branches upon conversion of a state bank, and 36(c) speaks only to the establishment of new branches. As we have noted earlier, § 36(e) speaks to this precise question, but that section is effective only with respect to relocations occurring after May 31, 1997, and is therefore not applicable to our case. In short, both sections 30 and 36 are silent as far as our case today is concerned.

(b)

Having concluded that Congressional intent is not expressed on this specific issue, we turn now to determine whether the interpretation advanced by the Comptroller is a permissible one. See Chevron at 841-43, 104 S.Ct. at 2781; Smiley, at ----, 116 S.Ct. at 1735. For the reasons that follow, we conclude that the Comptroller reasonably interpreted the statutes.

Initially, the Comptroller's position is supported because, although there are specific enumerated conditions that must be satisfied before relocation of a main office, Congress did not provide that lawfully established pre-existing branches must be forfeited. In effect, the Commissioner's position would result in a deprivation of the lawfully acquired property interests of Sun World without express statutory authority. We doubt Congress would have intended such an extreme consequence in implied or oblique terms.

Indeed, when Congress did address the matter, it did so in express words. Sections 30(c) and 36(e)--added by the Riegle-Neal Act in 1994--specifically condition the retention of existing branches after out-of-state relocation of a main office upon the satisfaction of certain conditions, which focus on state law. See 12 U.S.C. §§ 30(c), 36(e). These provisions apply only to moves occurring after May 31, 1997, and, thus, have no direct impact on the case before us today. The addition of these sections, however, indirectly supports the Comptroller's position. The Supreme Court recently has noted that the imposition of a Congressional limitation on a national bank's authority is logical only if the banks already had the authority. See NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257-59, 115 S.Ct. 810, 814, 130 L.Ed.2d 740 (1995). In other words, it makes on sense to impose conditions on the ability to retain existing branches following relocation of a main office unless that ability already existed in some fashion.(5)

The Conference Report accompanying the adoption of the Riegle-Neal Act also lends credence to the interpretation adopted by the Comptroller. The Report contained the following:

The Comptroller of the Currency (OCC) has used the 30 mile relocation provision of the National Bank Act ... to approve several transactions which have permitted national banks to move their main offices to other States but to retain branches in the States left by the Main offices. [(6)] Section 102(b)(2) amends the provision so that after June 1, 1997, a national bank relocating its main office to another state may maintain its branches in the first state only if those branches could have been established by a bank with its home State in the new State....

The Conferees are aware of the OCC procedures in permitting relocation across state lines. The Conferees concur with those procedures, including the application of appropriate State law and authority. [(7)] The Conferees expect the OCC to continue to follow those procedures until the provisions of Title I become fully applicable on June 1, 1997.

H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. 57 (Aug. 2, 1994) (footnotes added). This statement suggests that Congress indeed viewed the practice of allowing retention of branches upon relocation under § 30(b) favorably and did not intend to end the practice until the effective date of the Riegle-Neal amendments.

We have found no indication, nor has the Commissioner provided us with any evidence, that the interpretation adopted by the Comptroller his unreasonable. Given that Congress has addressed branch retention in only two ver limited circumstances--neither of which apply to main office relocations--we conclude that it is reasonable under § 30 and § 36 for the Comptroller to allow banks relocating before June 1, 1997, to retain their lawfully established pre-existing branches in their former home state.

The decision of the Comptroller of Sun World's first application therefore is reinstated; Sun World will be permitted to relocate its main office from El Paso, Texas, to Santa Teresa, New Mexico, and to continue to operate its two pre-existing branches in El Paso, Texas. We turn now to the second application and determine

whether Sun World should be allowed to open a new branch at the site of its former main office in El Paso.

(3)

There is no dispute that this second question is governed by § 36(c); therefore, Sun World may open a new branch at the site of its former main office in accordance with the following:

A national banking association may ... establish and operate new branches: (1) Within the limits of the city ... in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question....

12 U.S.C. §36(c) (emphasis added). First, Sun World first must be "situated" in El Paso, Texas—the city in which it wishes to establish a new branch. Second, the banking laws of Texas—the law of the state in question—must be broad enough to allow a State bank located in El Paso to establish a new branch in the city. The Comptroller held that for purposes of this section, Sun World was situated in both El Paso, Texas, and Santa Teresa, New Mexico, and therefore could establish a new branch in El Paso because such a branch would be authorized by the state law of Texas.

The Comptroller relied upon the interpretation of § 36 established by Seattle Trust and Savings Bank v. Bank of California, 492 F.2d 48 (9th Cir. 1974), cert. denied, 419 U.S. 844, 95 S.Ct. 77, 42 L.Ed.2d 72 (1974), to resolve this question. Seattle Trust involved a bank with its corporate headquarters in California and legally established branches in Seattle, Washington. The bank sought to establish a new branch in Seattle, and the Comptroller approved the application. Id. at 49. On appeal, the Ninth Circuit affirmed the decision of the Comptroller, holding that for purposes of § 36(c) the bank was situated in both California—the site of its corporate headquarters—and Washington—the site of its legally established branches. Id. at 51-52. The court then held that, because the bank

was situated in Washington, that state's branching law controlled the question whether a new branch could be established in Seattle. Id. at 52.

We agree with the Comptroller that Seattle Trust is applicable to the facts before us today. As a result of our holding that Sun World is authorized to relocate its main branch to Santa Teresa, New Mexico, and to retain its branches in El Paso, Texas, Sun World occupies a position identical to the one occupied by the bank in Seattle Trust. In point of fact, Sun World actually is situated in both New Mexico and Texas. We therefore conclude that the Comptroller's decision that Sun World was situated in El Paso for the purposes of § 36(c) is a reasonable interpretation of the statutory terms. Texas branching law therefore applies to determine whether Sun World may open a new branch in the city. Under that law, a State bank may "establish and maintain branches at any location" without geographic limit. See Tex.Rev.Civ. Stat. Ann. art. 342-3.201(a) & 342-3.203 (West Supp. 1996). Sun World is entitled under § 36(c) to that same grant of branching authority and, thus, can establish a new branch at the sit of its former main office. In short, we reinstate the Comptroller's decision on Sun World's second application, which sought authorization to establish a new El Paso branch.

III

In conclusion, we find that the statutes at issue do not address the question of branch retention after relocation under § 30(b) to another state of a main office. Under Chevron, we give deference to the Comptroller's interpretation of the statutes if that interpretation is permissible. Finding the interpretation permissible, we accordingly defer and reinstate the decision of the Comptroller allowing the retention of the branches. With respect to Sun World's second application, we are persuaded by the rationale of Seattle Trust that the Comptroller's interpretation and application of the statute is reasonable and hold that after the relocation, Sun World is situated in both El Paso, Texas, and Santa Teresa, New

Mexico, because it has retained its Texas branches. Thus, the creation of a new branch in El Paso, Texas is governed by Texas law. Texas law allows State banks to branch at-will; therefore, the new branch is legally authorized under the portion of § 36(c) incorporating state law restrictions.

The decision of the district court is therefore VACATED and the case will be REMANDED to the district court for entry of judgment in favor of the Comptroller.(8)

VACATED and REMANDED for entry of judgment.

******
******
******

1. The Commissioner initially instituted the district court action against Sun World prior to the Comptroller's decisions on the applications. After the Comptroller ruled on the applications, the complaint was amended to include the Comptroller as a party.

2. The statutes that govern this appeal are 12 U.S.C. § 30 and § 36. These statutes provide, in relevant part:

> § 30. Change of name or location
>
> (b) Location change
>
> Any national banking association, upon written notice to the Comptroller of the Currency, may change the location of its main office to any authorized branch location within the limits of the city, town, or village in which it is situated, or, with a vote of shareholders owning two-thirds of the stock of such association for a relocation outside such limits and upon receipt of a certificate of approval from the Comptroller of the Currency, to any other

location within or outside the limits of the city, town, or village
in which it is located, but not more than thirty miles beyond such limits.

(c) Coordination with section 36 of this title

In the case of a national bank which relocates the main office of such bank from one State to another State after May 31, 1997, the bank may retain and operate such branches within the State from which the bank relocated such office only to the extent authorized in section 36(e)(2) of this title.

12 U.S.C. § 30.

§ 36. Branch banks

The conditions upon which a national banking association may retain or establish and operate a branch
or
branches are the following:

(a) Lawful and continuous operation

A national banking association may retain and operate such branch or branches as it may have had in lawful operation on February 25, 1927, and any national banking association which continuously maintained and operated not more than one branch for a period of more than twenty-five years immediately preceding February 25, 1927, may continue to maintain and operate such branch.

(b) Converted State banks.

(c) New branches

A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by the language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

(e) Exclusive authority for additional branches

(1) In general

Effective June 1, 1997, a national bank may not acquire, establish, or operate a branch in any State other than the bank's home State ... or a State in which the bank already has a branch unless the acquisition, establishment or operation of such branch in such State by such national bank is authorized under this section or section 1823(f), 1823(k) or 1831(I) of this title.

(2) Retention of branches

In the case of a national bank which relocates the main office of such bank from one State to another State after May 31, 1997, the bank may retain and operate branches within the State which was the bank's home State ... before the relocation of such office only to the extent the bank would be authorized, under this section or any other provision of law referred to in paragraph (1), to acquire,

> establish, or commence to operate a branch in such State if—
>
> (A) the bank had no branches in such State; or
>
> (B) the branch resulted from—
>
> (I) an interstate merger transaction approved pursuant to section 1831(u) of this title; or
>
> (II) a transaction after May 31, 1997, pursuant to which the bank received assistance from the Federal Deposit Insurance Corporation under section 1823(c) of this title.

12 U.S.C. § 36.

3. This holding is not seriously challenged by the Commissioner on appeal, and, to the extent that it is challenged, the appeal is without merit in the light of the express language of section 30(b) establishing a thirty-mile limitation on relocation without reference to state lines. Notably, a limitation requiring that the move be "within the same state" was deleted from the statute in 1959.

4. When faced with a question not addressed specifically by Congress, the Supreme Court has noted that

> It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering. As we observed only last Term, that practice extends to the judgments of the Comptroller of the Currency with regard to the meaning of the banking laws.

Smiley, at ——, 116 S.Ct. at 1733 (internal citations omitted).

5. We reject the Commissioner's argument that the addition of §§ 30(c) and 36(e) was a grant of power to the Comptroller and national banks never before enjoyed. This argument is nonsensical because, if carried to its conclusion, no relocating national bank previous had the authority to retain its pre-existing branches even if it simply moved its main office across the street. Further, under the Commissioner's argument, after June 1, 1997, only a bank relocating across state lines can retain branches under certain conditions while a bank relocating in the same state—which the new amendments do not address—apparently must divest its branches and apply to re-establish them under § 36(c). The obvious weakness of this interpretation stands in sharp contrast to the interpretation urged by the Comptroller: Until June 1, 1997, all banks may relocate in accordance with § 30(b) without divestiture of their lawfully established pre-existing branches; then, after that date, interstate relocations will be limited by the conditions of §§ 30(c) and 36(e). In any event, our inquiry is not which interpretation is preferred, but whether the Comptroller's interpretation is permissible. We think that it is indeed permissible.

6. These decisions are the Decision on the Applications of American Security Bank, N.A., Washington, D.C., and Maryland National Bank, Baltimore, Maryland (OCC Corporate Decision No. 94-05, Feb. 4, 1994), reprinted in [1993-94 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89, 695 and the Decision on the Applications of First Fidelity Bank, N.A., Pennsylvania, Philadelphia, Pennsylvania, and First Fidelity Bank, N.A., New Jersey, Newark, New Jersey (OCC Corporate Decision No. 94-04, Jan. 10, 1994), reprinted in [1993-94 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶89, 644. Both decisions relied upon the provisions of § 30(b) to conclude that a bank could retain its pre-existing branches after relocating its main office out-of-state, although both also provided alternative bases for the retention of the branches.

7. Both decisions referred to by the legislative history, see supra note 6, involved questions of state law in the course of

determining whether a new branch could be opened in the former home state. See 12 U.S.C. § 36(c) (relying on state law to determine ability to open new branch).

8. Our holding today renders unnecessary any consideration of Sun World's appeal from the district court's award of attorneys' fees to the Commissioner. See Ghiglieri v. Sun World, N.A., appeal docketed, No. 96-50948 (5th Cir. Dec. 9, 1996), consolidated for decision with No. 96-50847 (5th Cir. May 12, 1997).

United States Court of Appeals,

Fifth Circuit.

Nos. 96-10818.

Catherine A. GHIGLIERI, in her official capacity as Texas Banking Commissioner, Plaintiff-Appellee,

v.

Eugene A. LUDWIG, in his official capacity as United States Comptroller of the Currency; Commercial National Bank of Texarkana, Texarkana, Texas, Defendants-Appellants.

October 29, 1997

Appeals from the United States District Court for the Northern District of Texas.

Before REAVLEY, JOLLY and BENAVIDES, Circuit Judges.

PER CURIAM:

The questions presented in this appeal are whether a national bank that relocated its main office across state lines before June 1, 1997, could retain its pre-existing branches in its former home and whether it could establish a new branch at the site of its former main office. The district court concluded that Commercial

National Bank of Texarkana could do neither. In light of this court's recent decision in *Ghiglieri v. Sun World National Association*, 117 F.3d 309 (5th Cir. 1997) and Arkansas law, we vacate and remand for entry of judgment in favor of appellants.[1]

I.

In 1994, Commercial National Bank of Texarkana ("CNB" or "the bank") applied to the Office of the Comptroller of the Currency ("the Comptroller" or "the OCC") to relocate its main office from Texarkana, Arkansas to Texarkana, Texas. At that time, the bank also operated two branch offices and an automated teller machine in Texarkana, Arkansas, and a third branch office in Fouke, Arkansas. When the bank requested approval for the relocation of its main office, it simultaneously sought the Comptroller's authorization to establish a new branch at its soon-to-be former main office in Texarkana, Arkansas. The Comptroller approved both applications over the objections of the Texas Banking Commissioner ("the Commissioner") and the Arkansas State Bank Department.[2]

The Commissioner brought suit against the Comptroller and CNB in federal district court, seeking review of the Comptroller's decision and asking for declaratory and injunctive relief. All parties filed motions for summary judgment. The Commissioner moved for summary judgment on the grounds that (1) CNB could not relocate its main office across state lines, even if the move was within the 30-mile limit established by 12 U.S.C. § 30(b); (2) procedural defects in CNB's applications should have defeated their approval; (3) CNB's temporary main office was actually a branch office; (4) CNB could not retain its branches after relocating its main office to Texas; and (5) CNB could not create a new branch at its former main office in Arkansas. The district court granted summary judgment to the Commissioner on the fourth and fifth grounds. The district court's order set aside the Comptroller's decisions with respect to the retention of CNB's pre-existing

branches and its establishment of a new branch at the site of its former main office; enjoined CNB's banking operations in the State of Texas; and enjoined the Comptroller from approving similar relocation applications.

II.

Whether a national bank that relocated its main office across state lines before June 1, 1997, could retain its pre-existing branches in its former home state was resolved squarely by this court in *Ghiglieri v. Sun World*, 117 F.3d at 313-15. In that case, we concluded that the National Bank Act, 12 U.S.C. § 21 *et seq.*, is silent with respect to the retention of branches following a main office relocation and that the Comptroller's interpretation of the statute to allow retention of pre-existing branches was reasonable. Accordingly, under the Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), we deferred to the Comptroller's interpretation. We are bound by our holding in *Sun World*. Accordingly, CNB can relocate its main office from Texarkana, Arkansas to Texarkana, Texas and retain its pre-existing Arkansas branches, and the district court erred in concluding to the contrary.

III.

We next address the issue of whether CNB could establish its former main office as a new branch. Section 36(c) governs the resolution of this issue. *See* 12 U.S.C. § 36(c); *Sun World*, 117 F.3d at 315. Under that provision, a national bank can establish and operate a new branch "[w]ithin the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question." 12 U.S.C. § 36(c)(1). Under this court's analysis in *Sun World*, CNB is situated in both Texas and Arkansas, and the creation of a new branch in Texarkana, Arkansas is governed by the law applicable to Arkansas state

banks. 117 F.3d at 316 (citing *Seattle Trust & Sav. Bank v. Bank of Calif.*, 492 F2d 48 (9th Cir. 1974).

The district court concluded that CNB could not establish its former main office as a branch office under Arkansas law. This conclusion was based in part on the premise that CNB was not entitled to retain its pre-existing Arkansas branches after relocating its main office. Our decision in *Sun World* established that that premise is faulty and that the bank can indeed retain its pre-existing branches. But that does not end the inquiry in the Comptroller's favor. We still must determine whether Arkansas branching law would allow a state bank in CNB's position to establish a new branch in Texarkana, Arkansas.

The Comptroller concluded that two provisions of Arkansas law permitted the establishment of CNB's former main office as a new branch. The first allows an Arkansas state bank to establish a branch "anywhere within the county in which the establishing bank's principal banking office is located." Ark. Code Ann. § 23-32-1202(b)(1).

The Comptroller relied on the Third Circuit's reasoning in the *Seattle Trust* case to conclude that the county of CNB's "principal banking office" for the purpose of Arkansas branching law was Miller County, Arkansas, where CNB's former main office and pre-existing branches were located. In *Seattle Trust*, the Third Circuit reviewed the Comptroller's construction of a Washington branching statute that mirrors Section 23-32-1202(b)(1) of the Arkansas Code. 492 F.2d at 52. The Washington statute restricted a state bank to branching in "the city or town in which its principal place of business is located...." *Id.* the court concluded that a national bank's principal place of business under this statute was Seattle, Washington, even though the bank's corporate headquarters were in San Francisco, California. 494 F.2d at 52-53. The Third Circuit agreed with the Comptroller that "principal place of business," as used in Washington banking law, should be construed to mean "the principal place of business within the State of

Washington." *Id.* at 52. As the *Seattle Trust* court explained, "There is no such thing as a Washington state bank with its principal place of business outside Washington." *Id.* at 52-53. The Comptroller in this case reasoned that there is no such thing as an Arkansas bank with its principal banking office outside of Arkansas, and, accordingly, that Miller County, Arkansas, where all CNB's facilities were located before the main office relocation, must be the location of its principal banking office within Arkansas.

We need not, however, adopt the Third Circuit's analysis on this point because, as the Comptroller concluded, the propriety of the conversion of CNB's former main office into a branch office is answered plainly in Section 23-32-1202(b)(2) of the Arkansas Code, which provides:

A bank which relocates its principal banking office may continue to use its former principal banking office location as a full service branch and customer-bank communication terminal so long as the use as banking facility is uninterrupted.

Ark. Code Ann. § 23-32-1202(b)(2). Because the Comptroller on March 8, 1995, simultaneously allowed CNB to relocate its main office to Texarkana, Texas and to establish its former main office in Arkansas as a branch, there is on question that the use of this office as a banking facility was uninterrupted. The district court should have upheld the Comptroller's approval of the establishment of a new branch at the site of CNB's former main office based on Section 23-32-1202(b)(2).

IV.

Accordingly, we VACATE the decision of the district court and REMAND to the district court for entry of judgment in favor of the Comptroller and CNB.

REAVLEY, Circuit Judge, concurring:

I concur in the judgment because I accept the construction of 12 U.S.C. § 36(c) to permit the establishment of branches within Arkansas when branches, though now not the home office, have been located there. The statute allows this "within the state in which said association is situated...." A prior panel has agreed with the Ninth Circuit and the Comptroller that this describes a situated branches as well as main office. I do not disagree and can read the statute to allow branches to be retained where new branches could be established. My esteemed colleagues are in error, however, when they say that § 36 is silent with respect to the retention of branches after relocation of the main office. Section 36 begins: "The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:" We are required to find the authorization in the language of § 36(c). Because I agree that we can, I concur.

1. The Commissioner's motion to strike the attachments to the amicus curiae brief of the Consumer Bankers Association and Bankers Roundtable is granted.

2. The Arkansas State Bank Department was not a party to the district court proceedings nor is it a party on appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

CATHERINE A. GHIGLIERI, Texas Banking Commissioner, Plaintiff,	§	
v.	§	EP-96-CA-324-DB
SUN WORLD, NATIONAL ASSOCIATION and EUGENE A. LUDWIG, Comptroller of the Currency for the United States, Defendants.	§	

MEMORANDUM OPINION AND ORDER

On this day, the Court considered the various Motions and Cross-Motions for Summary Judgment filed by each of the parties to the above-captioned cause. All Motions and Cross--Motions were timely filed. On Thursday, September 5, 1996, the Court heard the arguments of the parties. After due consideration, the Court is of the opinion that this action should be resolved as set forth below.

FACTS

Sun World, National Association ("Sun World") is a national bank chartered by the Office of the Comptroller of the

Currency of the United States ("OCC") under the National Bank Act. 12 U.S.C. § 21 *et. seq.* Until August 2, 1996, Sun World operated its main office and two branches in El Paso, Texas. On that date, the OCC authorized Sun World to: (1) relocate its main office from El Paso, Texas, to Santa Teresa, New Mexico; (2) establish and operate a new branch at its former main office site in El Paso, Texas; and, (3) retain its two existing branches in El Paso, Texas.

STANDARD OF REVIEW

"The Comptroller has wide discretion in the field of national banking and the exercise of his discretion will not be disturbed except when the exercise is arbitrary, capricious, or contrary to law." *First Nat'l Bank of La Marque v. Smith*, 610 F.2d 1258, 1264 (5th Cir. 1980) (citing *Ramapo Bank v. Camp*, 425 F.2d 333, 341 (3rd Cir.), *cert. denied*, 400 U.S. 828 (1970); *First Nat'l Bank of Bellaire v. Comptroller of the Currency*, 697 F.2d 674, 680 (5th Cir. 1983); 5 U.S.C § 706(2)(a). The Comptroller's determination must be upheld if it is a "permissible construction" of the National Bank Act. *Department of Banking & Consumer Finance v. Clarke*, 809 F.2d 266, 269 (5th Cir.), *cert. denied*, 107 S.Ct. 3240 (1987) (citing *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *Texas v. U.S.*, 756 F.2d 419 (5th Cir.), *cert. denied*, 106 S.Ct. 129 (1985).

The Court notes that the decisions of the Comptroller are not unfettered. "The Comptroller must be subordinate to the law from which he received his authority, and is subject to the limitations imposed by that law.... Though he may exercise the discretion the expertise of his office affords him, the congressional grant of authority does not empower arbitrary and

capricious action, nor does it contemplate abuses of that discretion." *Bellaire*, 697 F.2d at 680.

The arbitrary and capricious standard applies to factual controversies. *Seattle Trust & Sav. Bank v. Bank of California, N.A.*, 492 F.2d 48, 50 (9th Cir.), *cert. denied*, 95 S.Ct. 77 (1974). However, when the issue is whether the Comptroller has acted within the limitations imposed upon him by federal and state law, the standard of review is *de novo*. *Id.; Ghiglieri v. Ludwig*, WL 315947 (N.D. Tex. 1996) (citing *Washington ex rel. Edwards v. Heimann*, 633 F.2d 886, 888, n. 1, (9th Cir. 1980). (The district court's review of the Comptroller's decision is a *de novo* determination of the legal issues involved). Both Defendants asserted numerous times, in their briefs and in oral argument, that the courts owe deference to a decision of the OCC pursuant *to Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and *Smiley v. Citibank*, __ U.S. __, 116 S.Ct. 1730 (1996). This Court agrees with Defendants as to the deferential standard, but notes that "while administrative agencies are expert in technical problems within their jurisdiction, they enjoy no special skill in statutory construction, an area in which the courts are the final authority." *Western Coal Traffic League v. U.S.*, 694 F.2d 378, 383-84 (5th Cir.), *on reh'g*, 719 F.2d 772 (5th Cir. 1982), *cert. denied*, 104 S.Ct. 2160 (1984).

STANDARD FOR SUMMARY JUDGMENT

The standard for granting Summary Judgment pursuant to FED. R. CIV. P. 56(c) and the laws of the United States require that there be no genuine issue of material fact. *See Celotex Corp. v. Catrell*, 477 U.S. 317, 106 S.Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505

(1986); *Matsushita Elec. Industr. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986); *Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir. 1994)(en *banc)*. Federal Rule of Civil Procedure 56(e) provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegation or denials of the adverse party's pleadings, but ... must set forth specific facts showing that there is a genuine issue for trial.

After a careful review of all available summary judgment evidence, the Court is of the opinion that Plaintiff's Cross-Motion for Summary Judgment should be granted, as Defendants are unable to show that there is a genuine issue of material fact regarding the claims set forth below.

DISCUSSION

Defendants first assert that the OCC's approval of Sun World's relocation of its main office to New Mexico was clearly lawful. The Court does not find this point to be in dispute. Under Section 30 of the National Bank Act, a national bank enjoys limited express authority to relocate its main branch.[1]

---

[1]Title 12 U.S.C. § 30(b) reads as follows:

> Any national banking association, upon written notice to the Comptroller of the Currency, may change the location of its main office to any authorized branch location within the limits of the city, town, or village in which it is situated, or, with a vote of shareholders owning two-thirds of the stock of such association for a relocation outside such limits and upon receipt of a certificate of approval from the Comptroller of the Currency, to any other location within or outside the limits of the city, town,

Section 30(b) was amended in 1959 to delete a "within the same state" restriction on main office relocations.[2] *McEnteer v. Clarke,* 644 F. Supp. 290, 292 (E.D. Pa. 1986). Absent such a restriction, it seems relatively obvious that Sun World's relocation of its main office across the Texas/New Mexico state line was authorized under Section 30(b).

Therefore, the Court finds that the primary issues in this case are: (1) whether there is any authority available under the National Banking Act, either express or implied, which would allow Sun World to retain its Texas branches after relocating its main office to Santa Teresa, New Mexico; and, (2) whether there is any authority available under the National Bank Act which would allow Sun World to establish a "new" branch office at its former main office. This Court is of the opinion that no such authority exists to support either proposition.

1. No Implied or Express Authority to Retain Branches

In 1994, Congress amended the National Banking Act to include Section 30(c), which specifically deals with the issue of branch retention after a national bank relocates its

---

or village in which it is located, but not more than thirty miles beyond such limits.

[2]Amended 1959, Pub. L. No. 86-230, § 3, 73 Stat. 457 (codified as amended at 12 U.S.C. § 30(b)(West Supp. 1996)).

main office across state lines.[3] Section 30(c) states that a national bank may retain and operate branches within the State from which the bank relocated its main office only to the extent authorized by Section 36(e)(2).[4]

The passage of Section 30(c) represents the first time that Congress authorized a national bank to retain branches in the former home state in connection with an interstate

---

[3]Amended 1994, Pub. L. No. 103-328, § 102(b)(2), 108 Stat. 2350 (codified as amended at 12 U.S.C. § 30(c)) which reads as follows:

> In the case of a national bank which relocates the main office of such bank from 1 State to another State after May 31, 1997, the bank may retain and operate branches within the State from which the bank relocated such office only to the extent authorized in Section 36(e)(2) of this Title.

[4]Section 36(e)(2) reads as follows: (emphasis added)

> In the case of a national bank which relocates the main office of such bank from 1 State to another State ***after May 31, 1997***, the bank may retain and operate branches within the State which was the bank's home State (as defined in subsection (g)(3)(B) of this section) before the relocation of such office only to the extent the bank would be authorized, under this section, or any other provision of law referred to in paragraph (1), to acquire, establish, or commence to operate a branch in such State if:
>
> (A) the bank had no branches in such State; or
>
> (B) the branch resulted from -
>
> (i) an interstate merger transaction approved pursuant to section 1831u of this title; or
>
> (ii) a transaction after May 31, 1997, pursuant to which he bank received assistance from the Federal Deposit Insurance Corporation under section 1823(c) of this title.

main office relocation.[5] After May 31, 1997, a national bank may retain branches in its former home state unless a state passes a law specifically prohibiting interstate branches or elects not to "opt in" pursuant to Section 36(g). Therefore, the lawfulness of a national bank's retention of branches after an interstate relocation is dependent on state law. Texas is, at this time, the only state which has not "opted in" pursuant to Section 36(g). *See* TEX. REV. CIV. STAT. ANN. Art. 489f (Vernon Supp. 1996). As a result, nothing will change in Texas after the amendments to Sections 30 and 36 become effective on June 1, 1997.[6]

Defendants argue that nothing in Section 30 remotely suggests that a national bank, which has relocated its main office across state lines, is required to divest itself of its existing branches after the relocation. Further, Defendants assert that a national bank under such circumstances enjoys an implied authority to operate branches in the former state as a necessary adjunct to the express authority to relocate the main office. While the Court agrees that the plain language of Section 30 does not touch on any divestiture

---

[5]The Court notes that the National Bank Act does allow for the retention of branches in two limited situations. *See* 12 U.S.C. §§ 36(b)(1) and 36(b)(2). Neither situation is applicable to the case at bar.

[6]The OCC urges that Congress intended an implied recognition of retention of existing branches until May 31, 1997, presumably based upon the inclusion of a specific date in the future. This argument lacks merit. The actions of the OCC cannot be justified pursuant to a statute which is not yet effective.

requirement, there exists no implied authority by which a national bank may continue to operate its existing branches after such a relocation of its main office across state lines.

Defendants point the Court to several cases to support their "implied authority" proposition, most notably the Third Circuit Court of Appeals case of *Ramapo Bank v. Camp*, 425 F.2d 333. In *Ramapo*, the court held that Section 30 controls a national bank's main office relocation regardless of the impact of state banking laws. That holding essentially allowed a national bank to relocate its main office *within the same state*, and to retain its former main office as a branch, under circumstances where such an occurrence would have been prohibited by Section 36. The case at bar deals with a national bank association which desires to retain branches in its former home state after relocating its main office *to another state*.

The retention of branches by a national bank which has relocated its main office from one state to another is specifically addressed in the National Bank Act. The plain language of the Act sets forth the method by which branches may be retained under the circumstances involved in this case. This Court finds that Section 30 must be read in conjunction with, and is limited by, Section 36. *See First Nat'l Bank of Southhaven v. Camp*, 333 F.Supp. 682 (N.D. Miss.) *aff'd w/out opinion*, 467 F.2d 121 (5th Cir. 1971); *Ghiglieri v. Ludwig*, WL 315947 (N.D. Tex. 1996); *National Bank of Marion v. The Van Buren Bank*, 418 F.2d 121 (7th Cir. 1969); *Burke v. Ludwig, Civ.* No. 3:96CV0579(AVC)(D. Conn. 1996). Neither Section 30

nor Section 36 confer any additional authority to branch or retain branches which is not specified in the statute. In other words, there exists no authority, either express or implied, to support the Defendants' proposition.

2. No Authority to Establish Former Main Office as a "New" Branch

As noted earlier, this Court is of the opinion that no authority exists which would allow Defendant Sun World to establish a "new" branch at its former main office in El Paso, Texas, after the relocation of the main office to Santa Teresa, New Mexico.

The establishment of new branches is governed by 12 U.S.C. § 36(c). Not coincidentally, this is the section on which the Comptroller based his authorization of the establishment of Sun World's former main office as a "new" branch. Section 36(c) allows the establishment of new branches with the approval of the Comptroller:

> ...at any point within the State in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

12 U.S.C. § 36(c)(2). In other words, a national bank is only permitted to branch to the extent that a state allows

branch banking for its own banks. *State v. Clarke,* 690 F. Supp. 573 (W.D. Tex. 1988); *First Nat'l Bank v. Walker Bank & Trust Co.,* 385 U.S. 252 (1966); *Washington ex rel. Edwards v. Heimann,* 633 F.2d 886, 889 (9th Cir. 1980). Federal law determines what constitutes a branch bank, but state law determines when, where, and how a national bank may branch, or if it may branch at all. *Heimann,* 663 F.2d at 889, 890. In deciding whether to approve a national bank's branch application, the Comptroller must consider all relevant state laws and comply with any requirements established by state statutes. *Id.*

Because the Court has already determined that the relocation of Sun World's main office from El Paso, Texas, to Santa Teresa, New Mexico, was proper, the question now is whether a New Mexico bank may branch back to Texas. The answer to that question is no.

Sections 30 and 36 of the National Bank Act must be considered jointly in order to test the good faith nature of the simultaneous applications to relocate and to branch. *First Nat'l Bank of Southhaven v. Camp,* 333 F. Supp. at 689. In *Southhaven,* the court stated that competitive equality between national and state banking systems "looks to substance and not form". *Id* at 690. *See also Jackson v. First Nat'l Bank of Gainesville,* 430 F.2d 1200 (5th Cir. 1970), *cert. denied,* 401 U.S. 947 (1971). The *Southhaven* court further held that the Comptroller would be justified in concluding that "a principal motivation" for relocating the bank's main office was to enable the bank to "accomplish branching under conditions contrary to state law." *Id.* In

this instance, the relocation of the main office was proper. However, a New Mexico bank cannot branch back to Texas under either Texas or New Mexico law.

Texas law prohibits a New Mexico bank from branching back into Texas. Texas state bank home offices and branches are governed by TEX. CIV. STAT. ANN. art. 342-3.201 *et seq.* (West Supp. 1996). Defendant Sun World argues that it is "situated" in Texas by virtue of its branches in Texas, and that Texas clearly grants state banks the authority to establish and maintain a branch office at any location on prior written approval of the banking commissioner.[7] This Court finds these arguments to be without merit. Sun World's relocation of its main office to Santa Teresa, New Mexico, caused it to be "situated" in New Mexico for purposes of Section 36(c). As of the date of the relocation of its main office, Sun World was no longer "situated" in Texas. It follows that Sun World is not a Texas state bank under Article 342-3.201 *et seq.*, and therefore has no authority to establish and maintain a branch at the location of its former main office pursuant to Article 342-3.203.

New Mexico law also prohibits Sun World's actions under these circumstances. New Mexico enacted the

---

[7]TEX. CIV. STAT. ANN. art. 342-3.203 states, in relevant part:

> A state bank may establish and maintain branch offices at any location on prior written approval of the banking commissioner.

Interstate Bank Branching Act, effective as of June I, 1996.[8] This Act allows New Mexico state banks to establish, maintain and operate one or more branches in a state other than New Mexico pursuant to an interstate merger transaction in which the New Mexico bank is the resulting bank. Interstate branching, either de novo or by acquisition of one or more branches, which does not involve all or substantially all of the assets and branches of a New Mexico bank, is prohibited. *Id.* at § 58-1C-5. Currently, a New Mexico state bank may not acquire branches in Texas. As noted earlier, Sun World is "situated" in New Mexico for purposes of Section 36(c). Once the amendments to Sections 30 and 36 take effect, on June 1, 1997, a New Mexico state bank will still be unable to acquire branches in Texas.

Accordingly, **IT IS HEREBY ORDERED, ADJUDGED** and **DECREED** that Plaintiff's Cross-Motion for Summary Judgment is **GRANTED**.

IT IS FURTHER ORDERED that Defendant Comptroller of the Currency's Motion for Summary Judgment, and Defendant Sun World's Motion for Summary Judgment, are hereby **DENIED.**

Finally, **IT IS ORDERED** that all other motions presently pending before the Court, which have not been

---

[8] N.M. STAT. ANN. §§ 58-1C-1 to -13 (Michie Supp. 1996). The Court notes that the effective date of the Act was prior to the date on which Sun World relocated its main office to New Mexico.

addressed above, are hereby rendered **MOOT** by this Order.

SIGNED this **29th** day of **October, 1996.**

THE HONORABLE DAVID BRIONES
UNITED STATES DISTRICT JUDGE

D-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CATHERINE A. GHIGLIERI, in her official capacity as Texas Banking Commissioner	§	
Plaintiff,	§	
v.	§	Civil No. 3:95-CV-2001-H
EUGENE A. LUDWIG, in his official capacity as United States Comptroller of the Currency, and COMMERCIAL BANK OF TEXARKANA, Texarkana, Texas	§	
Defendants.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INDEX

Introduction 1

I. Motions to Strike Affidavits 3

II. Findings of Fact 5

III. Conclusions of Law 8

A. Standard of Review 8

B. Summary Judgment Standard 10

C. Procedural Defects in the Bank's Application 11

D. Relocation Pursuant to Section 30 13

E. Simultaneous Relocation, Retention of Existing Branches and Establishment of Former Main Office as Branch Is Not Authorized by Law 18

1. No Implied Authority to Retain Branches Under Section 30 18

2. The Riegle-Neal Act and Texas' Opt-Out Provision 32

3. Establishment of Former Main Office as a

Branch Pursuant to Section 36(c) 36

IV. Conclusion 43

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CATHERINE A. GHIGLIERI, in her official capacity as Texas Banking Commissioner	§	
Plaintiff,	§	
v.	§	Civil No. 3:95-CV-2001-H
EUGENE A. LUDWIG, in his official capacity as United States Comptroller of the Currency, and COMMERCIAL BANK OF TEXARKANA, Texarkana, Texas	§	
Defendants.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This is a case of first impression. Plaintiff Texas Banking

Commissioner seeks judicial review pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., of two decisions issued by Defendant Comptroller of the Currency ("Comptroller" or "OCC"). The Comptroller's first decision ("Decision"), issued March 8, 1995, approved two applications of Commercial National Bank of Texarkana, Arkansas (the "Bank") to 1) relocate its main office to Texarkana, Texas while retaining its existing branches in Arkansas and 2) to open a new branch at the site of the Bank's main office in Texarkana, Arkansas. The second decision challenged was issued on August 24, 1995. That decision permitted the Bank to open a temporary facility in Texarkana, Texas pending construction of the relocated main office.

In her First Amended Complaint ("Complaint"), Plaintiff seeks a declaratory judgment setting aside the Comptroller's decisions. Plaintiff also seeks an order permanently enjoining 1) the Bank's Texas operations; 2) the Bank from conducting banking operations in Texas while retaining any branches in any other state, including Arkansas; and 3) the Comptroller from approving any further applications for the relocation of an out-of-state bank into Texas, or in the alternative, from concurrently approving any transaction involving the relocation of a national bank into Texas coupled with the establishment and retention of bank branches in the state of the former main office of such national bank. Complaint at 8-9.

The parties have filed motions for summary judgment.[1] In

---

[1] The Bank and the Comptroller have filed both filed Motions to Dismiss, or, alternatively, Motions for Summary Judgment. Plaintiff has filed a Motion for Summary Judgment. The Court will treat the Motions to Dismiss as Motions for Summary Judgment pursuant to Fed.R.Civ.P. 12(b).

addition, the Bank has filed Motions to Strike two affidavits submitted in support of Plaintiff's Motion for Summary Judgment. Three amicus curiae briefs have been filed in support of Plaintiff's position.[2] The Court heard oral argument on the summary judgment motions on May 2, 1996.

I. MOTIONS TO STRIKE AFFIDAVITS

The Bank has filed objections to the Affidavit of Commissioner Catherine A. Ghiglieri ("Ghiglieri" or "Plaintiff") and to the Affidavit of Dennis Waters ("Waters") that Plaintiff submitted in support of her Motion for Summary Judgment. The Bank argues that these affidavits should not be considered by the Court because the Court has already ruled that there would be no discovery in this case.

---

[2] The briefs -- all filed on January 29, 1996 -- were submitted by three different groups.

The first group represented by a brief is the State Bank Commissioners and Supervisors and the Conference of State Bank Supervisors ("CSBS"). The State Bank Commissioners from the following states have joined in this brief: Oklahoma, Iowa, Connecticut, New Hampshire, North Dakota, West Virginia, Arkansas, Virginia, Delaware, Maine, Michigan, Colorado, Mississippi and the District of Columbia. CSBS is the professional association of state government officials (including the Commissioners) who are responsible for chartering and regulating state-chartered banking institutions. The Commissioners' and CSBS' brief will hereinafter be referred to as "Commissioners' Amicus Brief".

The second group is the Independent Bankers Association of Texas ("IBAT"). IBAT is a trade association of independent state and national community banks throughout Texas. This brief will hereinafter be referred to as "IBAT's Amicus Brief".

The third brief was filed by Consumers Union. Consumer's Union is a nonprofit organization that publishes various publications including *Consumer Reports*. This brief will hereinafter be referred to as "Consumer Union's Amicus Brief".

On December 14, 1995, the Bank filed a Motion to Quash Notice of Intention to Take Deposition with Subpoena Duces Tecum and for Protective Order, and the Comptroller filed a Motion for Protective Order. Both Motions were referred to Magistrate Judge John B. Tolle for disposition, pursuant to 28 U.S.C. § 636(b). Judge Tolle held a hearing on Defendants' Motions and issued an Order on January 16, 1996 granting both Motions and holding that Defendants would not be required to engage in discovery in this action except on further order of this Court. See Order dated January 16, 1996. Plaintiff filed Objections to the Magistrate's Order on January 26, 1996. After considering Plaintiff's Objections, and the pleadings related thereto, the Court overruled the objections and affirmed the Magistrate Judge's Order pursuant to 28 U.S.C. § 636(b)(1)(A). See Order dated February 12, 1996.

Because the Court concurred with the Magistrate Judge in finding that there would be no discovery in this action, the Court is of the opinion that the Bank's Motions to Strike should be, and they are, **GRANTED**. The challenge to the Comptroller's decisions is limited to the Administrative Record ("Record") and the Affidavits will not be considered by the Court. Accord Camp v. Pitts, 93 S.Ct. 1241 (1973)("focal point for judicial review should be the administrative record already in existence"); State of Tex. v. Clarke, 690 F. Supp. 573, 578 (W.D.Tex. 1988)(court's decision as to propriety of Comptroller's determination on branching issues must be based on evidence offered in administrative record). See also 5 U.S.C. § 706 (" . . . the court shall review the whole record or those parts of it cited by a party . . . .").

II. FINDINGS OF FACT

1. Any finding of fact containing a conclusion of law is also a conclusion of law. Any conclusion of law containing a finding of fact is also a finding of fact.

2. Catherine Ghiglieri is the Banking Commissioner of the State of Texas and is charged with the administration of the Texas Banking Code and Texas Banking Act. Stipulated Fact No. 1.

3. Eugene A. Ludwig is the Comptroller of the Currency and heads the OCC, a bureau of the Treasury Department charged with the administration of the National Bank Act, 12 U.S.C. §§ 1 et seq.. Stipulated Fact No. 2.

4. The Bank is a national banking association chartered by the OCC pursuant to the National Bank Act, 12 U.S.C. §§ 21, et seq., and given Charter No. 15257. Stipulated Fact No. 3.

5. As of December 5, 1994, the Bank operated from its main office located at 224 East Fourth Street, Texarkana, Miller County, Arkansas 7550[4]. Stipulated Fact No. 4.

6. As of December 5, 1994, the Bank operated three branch offices in Arkansas, two in Texarkana and one in Fouke, and one stand-alone customer-bank communication terminal branch in a grocery store in Texarkana, Arkansas. All of these facilities are in Miller County, Arkansas. Stipulated Fact No. 5.

7. On December 5, 1994, the Bank filed an application to move its main office from 224 East Fourth Street, Texarkana, Miller County, Arkansas 75504, to 5515 Summerhill Road,

Texarkana, Texas. Stipulated Fact No. 6.

8. Also on December 5, 1994, the Bank filed an application with the OCC to establish a branch office at 224 East Fourth Street, Texarkana, Miller County, Arkansas 75504. Stipulated Fact No. 7.

9. The distance between the site of the Bank's then existing main office in Texarkana, Arkansas, and the proposed new location for its main office in Texarkana, Texas, is less than 30 miles. Stipulated Fact No. 9.

10. Plaintiff filed objections to the Bank's applications with the OCC. The Arkansas Banking Commissioner also filed objections. Stipulated Facts Nos. 10 and 11.

11. On March 8, 1995, Frank Maguire, then Senior Deputy Comptroller for Corporate Activities and Policy Analysis, approved the Bank's applications to relocate its main office to 5515 Summerhill Road and to establish a branch at the Bank's former main office site in Texarkana, Arkansas. Stipulated Fact No. 12.

12. On March 20, 1995, Plaintiff wrote to the Comptroller requesting reconsideration and abatement of the Decision. The OCC denied that request on April 11, 1995. Stipulated Fact No. 13.

13. On August 21, 1995, the Bank requested approval to locate an office at 5512 Summerhill Road, Texarkana, Texas, temporarily while constructing a new building at 5515

Summerhill[,] Road, Texarkana, Texas. The cost of the new building is approximately $1,500,000. Stipulated Fact No. 14.

14. Three days later, on August 24, 1995, the Comptroller approved the Bank's request that it be allowed to operate a temporary office at 5512 Summerhill Road, Texarkana, Texas. Stipulated Fact No. 15.

15. In May 1995, the Texas Legislature passed HB 889. See Act of Apr. 19, 1995, 74th Leg., R.S. ch. 58, 1995 Tex. Sess. Law Serv. 437 (Vernon). Friday, August 25, 1995 was the last business day prior to the effective date of Texas HB 889, which was effective on August 28, 1995. Stipulated Fact No. 16.

16. After opening its temporary Texas office at 5512 Summerhill Road, Texarkana, Texas the Bank continues to maintain its Arkansas Banking operations. Bank's Motion at 2.

17. The Administrative Record does not reflect that the Bank amended its 1964 organization certificate to specify its relocation to Texarkana, Texas, before August 24, 1995. Plaintiff's Response at 10. Nor does the Administrative Record reflect that the Bank's articles of association were amended before that date. Plaintiff's Motion at 4.

18. The Administrative Record does not reflect that the Bank's shareholders approved the main office relocation. Bank's Reply at 2.

III. CONCLUSIONS OF LAW

A. STANDARD OF REVIEW

1. "The Comptroller has wide discretion in the field of national banking and the exercise of his discretion will not be disturbed except when the exercise is arbitrary, capricious, or contrary to law." First Nat'l Bank of La Marque v. Smith, 610 F.2d 1258, 1264 (5th Cir. 1980)(citing Ramapo Bank v. Camp, 425 F.2d 333, 341 (3rd Cir.), cert. denied, 400 U.S. 828 (1970); First Nat. Bank of Bellaire v. Comptroller of the Currency, 697 F.2d 674, 680 (5th Cir. 1983); 5 U.S.C. § 706(2)(A). The Comptroller's determination must be upheld if it is a "permissible construction" of the National Bank Act. Dept. of Banking and Consumer Finance v. Clarke, 809 F.2d 266, 269 (5th Cir.), cert. denied, 107 S.Ct. 3240 (1987)(citing Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984); Texas v. U.S., 756 F.2d 419 (5th Cir.), cert. denied, 106 S.Ct. 129 (1985).

2. The Comptroller's discretion is not "unbridled." See Bellaire, 697 F.2d at 680. "The Comptroller must be subordinate to the law from which he received his authority, and is subject to the limitations imposed by that law. . . . Though he may exercise the discretion the expertise of his office affords him, the congressional grant of authority does not empower arbitrary and capricious action, nor does it contemplate abuses of that discretion." Id. (citation omitted).

3. The arbitrary and capricious standard applies to factual controversies. Seattle Trust & Savings Bank, 492 F.2d 48, 50 (9th Cir.), cert. denied, 95 S.Ct. 77 (1974). When the issue is whether the Comptroller has acted within the limitations imposed upon him by federal and state law, the standard of review is *de novo*. Id.; State ex Rel. Edwards v. Heimann, 633 F.2d 886,

888 n. 1 (9th Cir. 1980)(The district court's review of the Comptroller's decision is a *de novo* determination of the legal issues involved.).

4. "While administrative agencies are expert in technical problems within their jurisdiction, they enjoy no special skill in statutory construction, an area in which courts are the final authority." Western Coal Traffic League v. U.S., 694 F.2d 378, 383-84 (5th Cir.), *on rehearing*, 719 F.2d 772 (5th Cir. 1982), cert. denied, 104 S.Ct. 2160 (1984)(footnote omitted).

B. SUMMARY JUDGMENT STANDARD

5. In proper circumstances, awarding summary judgment is not disfavored in the federal courts: "[summary judgment reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." Fontenot v. Upjohn Co., 780 F.2d 1190, 1197 (5th Cir. 1986).

6. Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56.

7. The Court concludes that there are no material disputed facts in this case and that disposition by summary judgment is appropriate.

C. PROCEDURAL DEFECTS IN THE BANK'S

APPLICATIONS

8. The Court finds that the procedural defects in the Bank's applications are insufficient to warrant the relief Plaintiff seeks. See Curtill-Wright Corp. v. McLucas, 381 F. Supp. 657, 661 (D.N.J. 1974)(Court is not required to set aside agency decision when the legal deficiencies of the decision are readily curable, and the deficiencies do not squarely interfere with rights of protesting party).

9. The Court agrees with the Comptroller that there is no statutory or regulatory requirement that the Bank's organization certificate be amended *before* the Bank relocated its main office or before the Comptroller approved the relocation. Comptroller's Motion at 7; Oral Argument of Larry Stein, counsel for the OCC. Further, the Comptroller concedes that the Bank must amend its articles of association pursuant to 12 C.F.R. § 5.40(d)(3) but there is no basis for finding that the failure to do so before the move indicates an erroneous decision by the Comptroller. Comptroller's Motion at 8 n.7; Oral Argument of Larry Stein.

10. Similarly, the Court is not persuaded that the Comptroller's decisions should be invalidated because the Bank did not obtain the requisite shareholder approval, pursuant to 12 U.S.C. § 30.[3]

---

[3] 12 U.S.C. § 30 is a part of the National Bank Act, 12 U.S.C. §§ 1 et seq.. For the purposes of these Findings and Conclusions, when the Court refers to the National Bank Act, the Court is referring to 12 U.S.C. § 30. The part of the National Bank Act that pertains to branch banks is known as the McFadden Act, 12 U.S.C. § 36. Thus, when the Court refers to the McFadden Act, the Court is referencing 12 U.S.C. § 36.

Although the Record does not demonstrate that the shareholder approval was obtained, the Court is of the opinion that this is a defect which could be easily remedied. The omission does not invalidate the Comptroller's decisions.

D. RELOCATION PURSUANT TO SECTION 30

11. Federal law determines what constitutes a branch. State Ex Rel. Edwards v. Heimann, 633 F.2d 886, 889 (9th Cir. 1980).

12. 12 U.S.C. § 30 of the National Bank Act applies to main office relocations, and not to branch relocations. On the other hand, the McFadden Act, 12 U.S.C. § 36, applies to branching

---

12 U.S.C. § 30 is titled "Change of name or location" and it provides, in relevant part, as follows:

> (a) Name change
>
> Any national banking association, upon written notice to the Comptroller of the Currency, may change its name, except that such new name shall include the wor[d] "National".
>
> (b) Location change
>
> Any national banking association, upon written notice to the Comptroller of the Currency, may change the location of its main office to any authorized branch location within the limits of the city, town, or village in which it is situated, or, with a vote of shareholders owning two-thirds of the stock of such association for a relocation outside such limits and upon receipt of a certificate of approval from the Comptroller of the Currency, to any other location within or outside the limits of the city, town, or village in which it is located, but not more than thirty miles beyond such limits.

12 U.S.C. § 30 (West 1989).

authorizations.[4]

13. Plaintiff vigorously argues that the Comptroller's approval of the relocation of the Bank's main office pursuant to 12 U.S.C. § 30 was unauthorized because the new office in Texas is in effect a branch, and is not authorized under 12 U.S.C. § 30. Specifically, Plaintiff argues that the "Administrative Record contains no evidence to support a finding that [the Bank's] Texas operations constitute the relocation of its main office in compliance with Section 30." Plaintiff's Reply at 4.[5]

---

[4] Section 36, which is titled "Branch banks" provides, in relevant part, as follows:

> The conditions upon which a national bank may retain or establish and operate a branch or branches are the following:
>
> . . . .
>
> (c) New branches
>
> A national banking association may, with approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not by implication or recognition, and subject to the restriction as to location imposed by the law of the State on state banks.

12 U.S.C. §36 (West 1989).

[5] Plaintiff relies on the Waters and Ghiglieri Affidavits to argue that the evidence demonstrates that the relocated office is in reality a branch, and not a main office. Alternatively, in the event the Court rules, as it has, that judicial review is limited to the Administrative Record, Plaintiff argues that "there is inadequate evidence to support a rational conclusion that the *temporary* site is

14. The Court disagrees, and finds that the Bank is not operating a branch in Texarkana, Texas but rather a temporary main office.

15. Section 30(b) was amended in 1959 to delete the requirement that such a move be "within the same state." McEnteer v. Clarke, 644 F. Supp. 290, 292 (E.D.Pa. 1986). On its face, Section 30 permits relocations of a main office without regard to state lines. State of Idaho, 994 F.2d at 1444 (citing 12 U.S.C. § 30(b)).

16. "Section 30 does not oblige the Comptroller to first find "necessity" before he approves relocation of a national banking association's main office." Traverse City State Bank v. the Empire National Bank, 228 F. Supp. 984, 990 (W.D.Mich. 1964). "The statute is silent on the finding of "necessity" as a condition precedent to his approval of a national bank's main office. The language of the statute makes the move dependent only upon "approval" by the Comptroller and a vote of two-thirds of the shareholders of the national bank." Id.

17. There are various distinctions between a main office and a branch. Ramapo Bank, 425 F.2d at 341; see also Brief of the Comptroller in Marion National Bank of Marion v. The Van Buren Bank, 418 F.2d 121 (7th Cir. 1969) at 9-11 (submitted by Steven A. Fleckman at oral argument). As the Third Circuit noted in Ramapo Bank, one capital structure is authorized to the main office, regardless of the number of branches. 425 F.2d at 341. A branch does not have a board of directors. Id.

[the Bank's] current main office." Plaintiff's Response at 9.

Residency requirements are imposed on the directors in relation to the main office without regard to the location of the branches. Id. Lending limitations are based on the structure of the main office without regard to the number of branches. Id. A branch does not have separate shareholders. Id. A branch may be closed at any time without approval of either the shareholders or the Comptroller, whereas a main office may be closed only by liquidation, merger, or receivership, all of which require shareholder approval. Id. Applying these factors to the instant case, there is nothing in the Record to suggest that the relocation authorized a branch, rather than a main office.

18. In Ramapo Bank, the Third Circuit suggested that a temporary main office may constitute a "main office" pursuant to Section 30. 425 F.2d at 339-40 n. 19; see also Oral Argument of Charles Haworth, counsel for the Bank.

19. That the Bank is operating a temporary office does not establish that the office is a branch, rather than a main office. The Bank has stated reasons why it has not yet begun construction of its main office in Texas. Bank's Motion at 3; Oral Argument of Charles Haworth. The Court agrees that it is reasonable that the Bank has decided to delay construction pending the outcome of this litigation. See Oral Argument of Charles Haworth.[6]

---

[6] Mr. Haworth stated that " . . . to suggest . . . that we would have already moved into a permanent facility in Texas at a cost of a million to a million and a half dollars while this litigation is pending and while they are seeking a permanent injunction to throw us out of the state of Texas is silly to me." Transcript of May 2, 1996 Oral Argument ("Transcript") at 21.

20. Because the Court finds that the relocated main office is not a branch office in disguise, there is nothing erroneous in the Comptroller's approval of the Bank's application to relocate the main office under Section 30.[7] Plaintiff does not take issue with the relocation of the *main office* under Section 30, if the Court agrees -- as it does -- that the office that was relocated is not actually a branch office.[8]

E. SIMULTANEOUS RELOCATION, RETENTION

---

[7] The Court confines this finding to the *relocation* of the main office, only. The Court addresses retention of the Bank's branches in Arkansas separately. See *infra* at 18-32.

[8] The following exchange at oral argument between Plaintiff's attorney and the Court indicates Plaintiff's position on this issue:

COURT: I take it would you agree that if it is a relocation, it is authorized by Section 30, just the relocation to Texarkana alone in Texas?

MS. JOHNSON: If its [a] bona fide relocation of the main office.

COURT: If it's bona fide?

MS. JOHNSON: Yes, Your honor. What we contest here is the retention of the branches and the branches that are interstate branches that have resulted as a result of this transaction.

. . . .

COURT: And I may be repetitious here, but you don't contest their authority then to relocate as such, their authority to relocate their headquarters under Section 30.

MS. JOHNSON: We are not going to take that position in this case.

Transcript at 23, 28.

OF EXISTING BRANCHES AND ESTABLISHMENT OF FORMER MAIN OFFICE AS BRANCH IS NOT AUTHORIZED BY LAW

21. The Court is of the opinion that the key issue in this case is whether the Comptroller acted within the law by authorizing the Bank to retain its existing Arkansas branches when it granted the Bank authority to relocate its main office to Texas. For the reasons discussed below, the Court concludes that the Comptroller's March 8, 1995 Decision which allowed relocation of the Bank's main office and simultaneous retention of branches in Arkansas as well as establishment of a branch at the site of the former main office was contrary to law, and must be set aside.[9]

1. NO IMPLIED AUTHORITY TO RETAIN BRANCHES UNDER SECTION 30

22. The Comptroller argues that "[w]hen a national bank relocates its main office under Section 30, it may continue to operate its existing branches as an implied, but necessary, adjunct to the express authority to move the main office." Comptroller's Motion at 12-17, Decision at 4. The Court disagrees and concludes -- based on an examination of the relevant cases, statutes, and legislative history -- that when a national bank relocates its main office under Section 30, there is no implied authority to continue the operation of its existing

---

[9] Because the August 24, 1995 Decision allowing the temporary main office facility was issued in connection with the main office relocation approval granted in the March 8 Decision, it is obvious that the August 24 decision must also be set aside.

branches under Section 30.[10]

23. The Court agrees with Plaintiff and amici curiae that the effect of the Comptroller's position is to allow national banks to establish interstate branching networks in multiple states, without regard to and in violation of the provisions of Section 36.[11] See Commissioner's Amicus Brief at 3; Plaintiff's Response at 2. See also Oral Argument of Larry Stein, counsel for OCC.[12]

10

The Court observes that two sections in the National Bank Act allow for retention of branches in some banking transactions. Section 36(b)(1) states that a national bank resulting from the conversion of a State bank may retain and operate as a branch in some situations. See 12 U.S.C. § 36(b)(1). In addition, Section 36(b)(2) provides that a national bank resulting from the consolidation of a national bank with another bank may, under certain circumstances, retain a branch office. See 12 U.S.C. § 36(b)(2). Neither of these scenarios is implicated in the instant case.

11

The Court notes that while some branching networks may lawfully be established under Sections 36(b)(1) and (2) (see *supra* at n. 10), the potential branching ability the Court refers to in this case is the establishment of *de novo* branches. A *de novo* branch is a branch that a bank establishes on its own, without acquiring any other financial institution. Commissioner's Amicus Brief at 3 n. 1.

12

The following excerpt from the Oral Argument demonstrates that under the OCC's view of implied retention under Section 30, the Bank would be able to establish *de novo* branches even if such establishment would not be permitted under state law:

> COURT: What's to stop, at least until [the Riegle-Neal Act takes effect] under your theory, why couldn't the Bank just leap-frog from state to state?
>
> MR. STEIN: Well, the [Comptroller] is not obligated to grant the approval. The OCC has the discretion to grant or deny, of course . . . .

24. Section 30 and 36 are silent with respect to retention of branches after main office relocation, as the Comptroller acknowledges. See Comptroller's Motion at 10; Decision at 6.[13] In his March 8 Decision, the Comptroller acknowledges that the statutes are silent on the branch retention issue, but nonetheless concludes that by "examining the overall statutory framework and its historical development," Decision at 6, it can be inferred that Congress intended that retention be allowed. In a prior decision -- which the Comptroller refers to in the March 8 Decision -- the Comptroller acknowledged that "the legislative history of the statutes . . . does not address [the question of retention] question directly." Record at 50.[14]

25. The Comptroller's position that Section 30 must be read independently of the McFadden Act (Section 36) is not persuasive in light of the fact that Section 36 enunciates the

---

> COURT: Of course, it would be up the [Comptroller], but then, under the law, at least as we have it now under the [Comptroller's] interpretation in this particular situation, that would be possible, wouldn't it?
>
> MR. STEIN: That's correct, your honor.
>
> COURT: No matter what the state wanted.
>
> MR. STEIN: That's correct . . . .

Transcript at 12.

[13] The Riegle-Neal Act changed this, and the issue of branch retention is now addressed under that Act. The changes, however, do not take effect until 1997. See related discussion *infra* at pp. 32-36.

[14] See Decision of the Comptroller on the Applications of Bank of Midwest of Kansas, National Association, Lenexa, Kansas, and Bank Midwest, National Association, Kansas City, Missouri, dated February 16, 1995.

"conditions upon which a national bank may *retain* or establish and operate a branch or branches . . . ." 12 U.S.C. § 36 (emphasis added). The Court finds no basis to read retention considerations into Section 30 when Section 36 expressly covers branch retention. See Lewis v. United States, 445 U.S. 55, 60 (1980) ("The Court has stated repeatedly . . . that in any case concerning the interpretation of a statute, the starting point must be the language of the statute itself.").

26. The pleadings in this case contain voluminous references to the legislative history of the National Bank Act (12 U.S.C. § 21, et seq.) and to the general history of banking in the United States and Texas. The Court will not attempt to recite those detailed explanations here. Instead, the Court chooses to start with 1924, when the Supreme Court ruled that national banks had no general authority to establish branches. See First National Bank in St. Louis v. Missouri, 263 U.S. 640, 656 (1924).

27. Congress passed the McFadden Act (12 U.S.C. § 36) in 1927 to allow both national and state banks to establish branches within the municipality of their main banking facilities in those states that permitted branch banking at the time of the enactment of the bill. First Nat. Bank v. Walker Bank & Trust Co., 385 U.S. 252, 257-58 (1966). In Walker Bank, Justice Clark noted that "Congress intended to leave the question of the desirability of branch banking up to the states." Id. at 258. The Senate Report on the McFadden Act states that the Act should permit national banks to have branches in those cities where state banks are allowed to have them under state law. Id. (citing S.Rep. No. 473, 69th Cong. 1st Sess., 14 (1926)). A grandfather clause permitted retention of branches operated at the date of enactment. Id. (citing H.R. Rep. No. 1481, 69th Cong., 1st Sess., 6 (1926)).

28. The McFadden Act's chief sponsor stated that Section 36 "repeals every provision of the law with which it is in conflict

and outlines clearly the conditions under which a national bank may have a legal branch or branches hereafter. This amendment establishes a national banking policy." 68 Cong. Rec. 5816 (1927)(remarks of Congressman McFadden following passage of the McFadden Act).[15]

29. Amendments to the McFadden Act did not authorize retention of branches once the Bank's main office had relocated to another state. In 1933, the Act was amended by the addition of 12 U.S.C. 36(c)[16] which permitted national banks to branch only within their home state and only to the extent that state banks were authorized to branch under state law. See Walker Bank, 385 U.S. at 259.

30. The National Bank Act (Section 30) was amended in 1959 and 1982. The 1959 amendments, *inter alia*, removed prior language requiring national banks to confine their main office relocations "within the same state." The Comptroller acknowledges that the 1959 amendments to the National Bank Act were mostly technical, and the substantive amendment to Section 30 was "minor". See Bank Midwest Decision, Record at 40. The legislative history of the 1959 amendments suggests that the amendments were uncontroversial. See Plaintiff's Response at 24 (citing 105 Cong. Rec. 14, 777 1959; 105

---

[15] See also Record at 56 n. 18 (Comptroller's Bank Midwest Decision Part II(A)(2)(c)), wherein the Comptroller attempts to exaggerate the significance of this legislative history. The Court is not persuaded by the Comptroller's rationalization. The Court agrees, though, that Congressman McFadden's floor statement may not shed much light on Congress' intent regarding retention of branches. See e.g. Clarke v. Securities Industry Association, 479 U.S. 388, 405-09 (1987)("Representative McFadden cannot be considered an impartial interpreter of the bill that bears his name . . . . ").

[16] See *supra* at n. 4.

Cong.Rec. 16, 781-82 (1959)). See also Oral Argument of Larry Stein, counsel for OCC;[17] Ramapo Bank, 425 F.2d at 345-46 n. 35)("Section 30 was amended to require Comptroller approval before a national bank could change the location of its main office . . . . There is no evidence of any other congressional purpose ever having been voiced with respect to Section 30".). The fact that the interstate restriction in Section 30 was deleted does not, as the Comptroller suggests, mean that Congress intended to authorize relocation to another state with simultaneous retention of branches in the state of the former main office location. See Record at 42.[18]

31. Similarly, the 1982 amendments to the National Bank Act (Section 30) did not address the legality of branch retention upon a main office relocation to another state. The 1982 amendments were technical in nature and did not address the issue presented in this case. The Court disagrees with the Comptroller's strained conclusion that Congress' inaction on this issue in 1982 creates an implied right to retain branches after main office relocation to another state.

32. The Comptroller reasons, *inter alia*, that because other statutes contain additional banking authority, the McFadden Act

---

[17] Mr. Stein, the Comptroller's attorney, stated at oral argument that "[r]elocation authority has remained the same basically since 1886 except in 1959 Congress removed the in-state limitation." Transcript at 6.

[18] The Court notes that the parties have briefed the implication of the 1956 Douglas Amendment to the Bank Holding Company Act, 12 U.S.C. § 1842(d). Plaintiff acknowledges that the Act is not implicated in this case (Plaintiff's Response at 22) and the Court therefore declines to address the significance of the Amendment. The Court does note, however, that the main purpose of the Douglas Amendment was to apply the McFadden Act to Bank Holding Companies because those companies were previously not governed by the Act.

does not represent the exclusive authority for national bank branching. Comptroller's Reply at 16 (citing 12 U.S.C. §§ 1823(f)(4)(B) and 1823 (k)). However, the Court could just as easily interpret the existence of additional references to branch banking in the limited circumstances of 12 U.S.C. § 1823 as evidence that "Congress recognizes the need to provide express exceptions to the restrictions on interstate branching." IBAT's Amicus Brief at 8. The Comptroller's argument on this issue is devoid of merit.

33. Likewise, the Court is not persuaded by the Comptroller's tenuous argument regarding implied repeal. According to the Comptroller, allowing retention of existing branches under Section 30 does not conflict with the McFadden Act (Section 36) because an intent to repeal the effect of Section 30 is not evident. Comptroller's Reply at 16 (citing Watt v. Alaska, 451 U.S. 259, 266-67 (1981)(implied repeal is not favored and is used only when two statutes clearly address the same subject and are irreconcilable; statutes will be construed to avoid conflict where possible). The Court finds that the doctrine of implied repeal is completely irrelevant in this context. The Court does not question the authority to relocate a main office pursuant to Section 30. Section 30 does not speak to the issue of branch retention. By finding no implied authority to retain branches under Section 30, the Court is not repealing Section 30 by implication.

34. The Comptroller relies on several cases to support his claim of implied retention authority under Section 30. The cases relied upon do not address the precise issue presented in this case -- whether Section 30 permits national banks to move their main offices across state lines while retaining branches in their former home states.

35. For example, the Comptroller relies on Ramapo Bank, 425 F.2d 333. In that case, the Third Circuit held that Section 30 controls with respect to an application for a national main office

relocation free of the impact of state banking laws. 425 F.2d at 344. In effect, Ramapo Bank allowed a national bank to relocate its main office within the same state, and to retain its former main office as a branch, under circumstances where a direct branching transaction would have been prohibited by the McFadden Act (Section 36), which incorporates state law branching considerations. Adopting the rationale of the Traverse City case,[19] the Ramapo Bank court distinguished a contrary result that the Seventh Circuit reached in Marion National Bank, 418 F.2d 121.

36. In Marion National Bank, the Seventh Circuit held that there must be a conjunctive reading of Sections 30 and 36 with respect to an application of a national bank's main office and the conversion of its existing main office into a branch office, relying on Walker Bank, 385 U.S. 252.[20] The Marion National Bank court stated that where relocation and branch establishment were part of a "single indissoluble process," Sections 30 and 36 must be read together in light of the overall effect. 418 F.2d at 124. The court found the Traverse City case unpersuasive, and held that the "maneuver proposed involves creation of a branch which would not be authorized to state banks by the statute law" of the state in question, "and is therefore not authorized for national banks by 12 U.S.C. §

---

[19] See Traverse City State Bank v. Empire Nat'l Bank, 228 F. Supp. at 992.

[20] Ramapo Bank, Marion National Bank and Traverse City all related to *intrastate* relocation/branching transactions, not to *interstate* moves. There appear to be no cases addressing interstate relocation and branch retention. Accord Oral Argument of Larry Stein, Transcript at 52 ("The [Traverse City] court didn't comment upon retention of existing branches because those were not before the [c]ourt. We have never had a court decision speak to the precise issue of retention of a bank's existing branch in the context of interstate relocation.")

36(c). Id. at 125. Thus, in Marion National Bank, the branch application was rejected because the application was not authorized by state law.[21]

37. The Court declines to follow Ramapo Bank's holding that Section 30 is not limited by Section 36 and observes that a district court in this Circuit has cited Marion National Bank with approval. See First National Bank of Southhaven v. Camp, 333 F. Supp. 682, 88-90 (N.D.Miss.) *aff'd w/out opinion*, 467 F.2d 121 (5th Cir. 1971). Noting the conflict among the Circuits regarding whether Sections 30 and 36 should be viewed in tandem, the Southhaven court declined to "adopt either interpretation as an absolute" but concluded that "the Comptroller may consider the relationship between the two statutes to test the good faith nature of simultaneous applications" of a national bank for main office relocation and retention of the main office as a national branch. Id.[22] Thus,

---

[21] The Court is aware that Marion National Bank is factually distinguishable from the instant case because the "new" branch application in the instant case was decided under Section 36(c) ostensibly in *accordance* with state law. However, the only reason that Section 36(c) could be applied to the branch application in the instant case is because the Bank was permitted to retain its existing branches under the non-existent "implied" authority for branch retention under Section 30. The Court discusses Section 36(c) and the applicable state law *infra* at pp. 36-42. Marion National Bank is thus instructive in that it mandates that the overall nature of the Bank's applications should be examined together, rather than in isolation. Additionally the Court notes that other courts have grappled with the meaning of the word "new" in Section 36(c). See e.g. Heimann, 633 F.2d at 890 (Marion National Bank and Ramapo Bank do not conclusively establish the meaning of the word "new" but do support the district court's decision that Section 36(c) applies both to a "new" branch and to an "already-existing branch that might be acquired.")

[22] In the instant case, there is no dispute that Section 36 applies to the Bank's application to establish its former main office as a branch, and the Comptroller authorized that aspect of the Bank's application under that Section. The aspect of this case which necessitates -- in the Court's view -- a conjunctive reading

the Court concludes that the Comptroller's insistence that Section 30 is in no way limited by the McFadden Act (Section 36) has no support in this Circuit.

38. This Court's view comports with the principle of *pari materia* which suggests that statutory provisions should be construed with other provisions, and not in isolation. See Saxon v. Georgia Ass'n of Independent Ins. Agents. Inc., 399 F.2d 1010, 1013 (5th Cir. 1968).

39. Further, the Comptroller has previously taken the position that Section 30 cannot be read independently from Section 36. An Affidavit of past Comptroller James Saxon ("Saxon") in Traverse City demonstrates that the OCC was aware of an interdependence between the two sections. In his Affidavit[23] Saxon reviewed two files of his predecessor in which national banks had requested approval of main office relocations under Section 30, accompanied by establishment of a branch at the site of the former main office pursuant to Section 36(c). As Plaintiff notes, the two applications received different treatment because of the relevant state law which was examined pursuant to Section 36.[24]

---

of both Sections concerns the *retention* of already-existing Arkansas branches after the main office was moved.

[23] See Appendix E, attached to Plaintiff's Reply. The Court notes that Defendants do not object to this exhibit. See Defendants' Objections to Plaintiff's Exhibits at 2, filed April 15, 1996.

[24] Again, the Court notes that the cases examined by Saxon are distinguishable from this case because they did not deal with an "implied" authority for retention under Section 30. However, the Affidavit demonstrates support for Plaintiff's argument that Sections 30 and 36 are interrelated when an interstate main office relocation is accompanied by branch retention.

40. The Court also notes that OCC regulations suggest that Sections 30 and 36 cannot be viewed in isolation. The regulations state that a national bank desiring to retain the head office location as a branch must look to Section 36. See 12 C.F.R. §§ 5.40(d)(4); 5.30(a). The regulations further state that it is the OCC's "policy" that applications should be approved provided that "approval would not violate *the provisions of applicable federal law or state law that is incorporated into federal law regarding the establishment of* . . . branches." See 12 C.F.R. 5.30(c)(1)(emphasis added).

41. The Court notes that when an agency such as the OCC takes a position that is inconsistent with its previous views, that position is entitled to less deference. State Dept. of Idaho, 994 F.2d at 1445 (where an agency takes a position that is inconsistent with its previous views, the courts may owe less deference to the agency position; if new view is reasonable, it is entitled to some weight); I.N.S. v. Cardoza-Fonseca, 107 S.Ct. 1207, 1221 n. 30 (1987)(citing Watt v. Alaska, 451 U.S. 259 (1981)(internal quotations and other citation omitted).

42. The doctrine of competitive equality supports the Court's holding. The doctrine reflects Congress' intention to place national and state banks on a basis of competitive equality insofar as branch banking is concerned. Southhaven, 333 F. Supp. at 689 (citing Walker, 385 U.S. 252). See also First National Bank in Plant City v. Dickinson, 369 U.S. 122, 133 (1969) ("[T]he [doctrine] is . . . firmly embedded in the statutes governing the national banking system."); Dept. of Banking and Consumer Finance v. Clarke, 809 F.2d at 269 (Congress intended to place national and state banks on a basis of competitive equality insofar as branch banking was concerned). In enacting the McFadden Act (Section 36), "Congress was concerned that neither system have advantages over the other in the use of branch banking . . . . Id. (citation omitted). By using a non-existent "implied" authority to retain branches, the Comptroller has awarded the Bank a benefit which is not

available to Texas or Arkansas state banks.

42. The Court is unpersuaded by the Comptroller's attempts to isolate the impact of the doctrine of competitive equality from the transactions at issue in this case. See Oral Argument of Larry Stein, Transcript at 53. While it is true that the doctrine applies to branching decisions, rather than relocation decisions, the Court finds that the doctrine comes into play in a case such as this, where the branching decision can only exist by virtue of the "implied" retention of branches under Section 30. Because the practical overall effect of the Comptroller's decision is to allow interstate branching, the doctrine is relevant here. This is not merely "a relocation case," but a relocation decision coupled with retention and establishment of a new branch.[25]

43. The Court is also unimpressed by the Comptroller's argument that without retention of branches upon main office relocation, a bank would be penalized for exercising a right granted under the National Bank Act. Comptroller's Reply at 17; Oral Argument of Larry Stein. The right granted under the National Bank Act (Section 30) is the right to relocate a main office; Section 30 does not confer additional powers not authorized by statute.

44. The OCC has used the same legal approach regarding retention of branches after relocation in several of its prior decisions. See OCC American Security Bank, (OCC Corporate Decision No. 94-05, February 4, 1994); Bank Midwest Decision, February 16, 1995; Record at 24, and OCC First

---

[25] Oral Argument of Larry Stein, Transcript at 53.

Fidelity/New Jersey Decision, A.R. 115.[26] The Court finds it noteworthy that the Comptroller must rely on his prior decisions as the basis for his conclusions, rather than on case law.

2. THE RIEGLE-NEAL ACT AND TEXAS' OPT-OUT PROVISION

45. The parties as well as the amici curiae devote considerable attention to the effect and purpose of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub.L.No. 103-328, 108 Stat. 2338 ("Riegle-Neal"). Riegle-Neal authorizes interstate branching by merger or acquisition of a bank unless a state has opted out. De novo branching is not authorized, however, unless the state passes a law affirmatively allowing it. Congress has given the states until May 31, 1997 to determine whether they will opt out. See 12 U.S.C. 36(g).[27] Riegle-Neal

---

[26] Additional decisions on this issue may exist; the list does not purport to be all-inclusive.

[27] Section 36(g) provides, in relevant part, as follows:

> (1) In general
>
> Subject to paragraph (2), the Comptroller . . . may approve an application by a national bank to establish and operate a de novo branch in a State (other than the bank's home State) in which the bank does not maintain a branch if-
>
> (A) there is in effect in the host State a law that -
>
> (i) applies equally to all banks; and
> (ii) expressly permits all out-of-state banks to establish de novo branches in such State;
>
> . . . .

adds a new subsection (c) to Section 30[28], and a new subsection (e)(3)[29] to Section 36. The combination of these two additional

---

[28] Section (c) provides, in relevant part, as follows:

> Coordination with Section 36 of this title:
>
> In the case of a national bank which relocates the main office of such bank from 1 State to another State after May 31, 1997, the bank may retain and operate branches within the State from which the bank relocated such office only to the extent authorized in Section 36(e)(2) of this title.

[29] Section 36(e)(2) provides, in relevant part, as follows:

> (e) Exclusive authority for additional branches
>
> (1) In general
>
> Effective June 1, 1997, a national bank may not acquire, establish, or operate a branch in any State other than the bank's home State . . . or a State in which the bank already has a branch unless the acquisition, establishment, or operation of such branch in such State by national bank is authorized under this section or section 1823(f), 1823(k), or 1831(u) of this title.
>
> (2) Retention of branches
>
> In the case of a national bank which relocates the main office of such bank from 1 State to another State after May 31, 1997, the bank may retain and operate branches within the State which was the bank's home state . . . before the relocation of such office only to the extent the bank would be authorized, under this section . . . to acquire, establish, or commence to operate a branch in such State if -
>
> (A) the bank had no branches in such State; or

sections authorizes the retention of branches by a national bank relocating across state lines where such branches can lawfully be established under state law. The provisions do not take effect until June 1, 1997.

46. In May 1995, the Texas legislature passed H.B. 889,[30] "opting out" of the new interstate banking system scheduled to

---

> (B) the branch resulted from -
>
> (i) an interstate merger transaction approved pursuant to Section 1831u of this title; or
>
> (ii) a transaction after May 31, 1997, pursuant to which the bank received assistance from the Federal Deposit Insurance Corporation under section 1823(c) of this title.

[30] H.B. 889 provides, in relevant part, as follows:

> Section 2. Interstate mergers and branches prohibited.
>
> Notwithstanding any other law:
>
> (1) pursuant to Section 44(a)(2), Federal Deposit Insurance Act . . . a domestic bank may not engage in a merger transaction involving an out-of-state bank;
>
> (2) an out-of-state bank may not establish a de novo branch in this state or acquire a branch in this state by purchase or other means; and
>
> (e) a domestic bank may not establish a de novo branch in a state other than this state or acquire a branch in a state other than this state by purchase or other means.

be introduced by Riegle-Neal. This new opt-out law took effect on August 28, 1995, months after the Comptroller's Decision, and three days after the Bank commenced operations in Texas.

47. The parties disagree over the significance and meaning of the legislative history of Riegle-Neal, and both parties contend that the enactment of the Act supports their respective positions. In addition, Plaintiff and the amici curiae strongly argue that the Comptroller is ignoring the will of the Texas legislature by allowing interstate branching in contravention of HB 889. Plaintiff also argues that the Comptroller's decision subverts the purpose of Riegle-Neal.

48. The Court is of the opinion that the enactment of the Riegle-Neal Act is not as significant to the outcome of this case as the parties appear to believe. The provisions of Riegle-Neal that would apply to this case do not take effect until June of 1997. Further, HB 889 was not in effect at the time of the Comptroller's decision, and as such, that statute cannot form the basis for invalidating the Decision. For similar reasons, the Court declines to adopt the Comptroller's expansive notion that the enactment of Riegle-Neal is evidence that Congress intended an implied recognition of retention of existing branches until May 31, 1997.[31] The Comptroller cannot justify his action on

---

[31] The Court is aware that a portion of the Riegle-Neal House Conference Report states that the Conferees "were aware" that the Comptroller has used Section 30 to approve several transactions which have permitted national banks to move their main offices to other states but to retain branches in the States left by their main offices. See H.R. Conf. Rep. No. 651, 103d Cong., 2d Sess. 57 (Aug. 2, 1994). As the Commissioners' Amicus Brief notes, prior to passage of the Riegle-Neal Act, the OCC approved only two interstate main office relocations in which the national bank was permitted to retain branches in its old home state. Those decisions were on the applications of American Security Bank, Decision issued February 4, 1994, and First Fidelity Bank, Decision issued January 10, 1994. See Commissioners' Amicus Brief at 22 n. 25; Record at 32 n. 1.

The fact that the Report states that "[t]he Conferees . . . concur with

the basis of a statute that is not yet in effect. The Court believes it unnecessary to further address the significance of Riegle-Neal and HB 889.

3. ESTABLISHMENT OF FORMER MAIN OFFICE AS A BRANCH PURSUANT TO SECTION 36(c)

49. Having concluded that Section 30 does not create an "implied adjunct"[32] allowing for retention of existing branches in contravention of applicable state branching laws, the Court also concludes, for reasons discussed below, that the establishment of the "new" branch at the location of the former main office is not authorized by Section 36(c).

50. Section 36(c) applies to the establishment of new branches. The Comptroller based his authorization of the establishment of the Bank's former main office as a branch on Section 36(c). Section 36(c) allows the establishment of new branches with the approval of the Comptroller "at any point within the State in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question by language specifically granting such authority affirmatively and not merely by implication or

---

those procedures, *including the application of appropriate State law and authority*" and "expect the OCC to continue to follow those procedures until . . . June 1, 1997" (see id.)(emphasis added) does not validate the Comptroller's reliance on retention under Section 30 regardless of the mandates of Section 36. On the contrary, the Conferees reference to "applicable state law" suggests that the Conferees were mindful that Section 30 does not grant additional branching authority from that allowed under Section 36.

[32] See March 8 Decision wherein the Comptroller states that "[w]hen a national bank relocates its main office under [Section 30, it may continue to operate its existing branches as an *implied*, but necessary, *adjunct* to the express authority to move the main office." Record at 6 (emphasis added).

recognition, and subject to the restrictions as to location imposed by the law of the State on State banks." 12 U.S.C. § 36(c)(2).

51. 12 U.S.C. § 36(c) allows national bank branching only to the extent that a state permits branch banking for its own banking institutions. Clarke, 690 F. Supp. at 575 (citing Walker, 385 U.S. 252); Heimann, 633 F.2d at 889. Federal law determines what constitutes a branch bank, but state law determines when, where and how a national bank may branch, if indeed, it may branch at all. Heimann, 633 F.2d at 889 (citations omitted). In determining whether to approve national bank branch applications, the Comptroller must consider all relevant state laws and comply with any requirements established by state statutes. Id. at 890 (citations omitted).

52. "Congress has not entrusted the Comptroller with the power to make policy on the subject of branch banking. The policy-making role in this area is given to state legislatures." First U. Bank & Trust Co., Etc. v. Heimann, 600 F.2d 91, 99 (7th Cir.), cert. denied, 100 S.Ct. 423 (1979). If the Comptroller were allowed to relax state branching standards for national banks, the doctrine of competitive equality would be violated. Id. (citing First National Bank, 385 U.S. 252; Marion National Bank, 418 F.2d at 123-24).

53. The Court finds that the state banking statutes of both Texas and Arkansas are relevant in determining whether the branch authorization was valid under Section 36(c).[33]

---

[33] The Court notes that the Comptroller takes the position that only the Arkansas branching statute is relevant to this case because the Bank is situated in Arkansas for Section 36(c) purposes. See Decision at 13. For reasons discussed more fully below, the Court disagrees that the Bank is situated in Arkansas. Therefore, because the Bank is situated in Texas after the relocation, Texas branching laws apply pursuant to Section 36(c).

54. The Court first examines Texas branching law. Although the Bank was "situated in Texas" by virtue of the main office relocation, as required by Section 36(c), the Court finds that the establishment of a branch at the site of the former main office is not authorized under that Section because Texas state branching law did not allow interstate branching.

55. The Texas branching statute that was in effect at the time of the Comptroller's Decision was Tex.Rev.Civ.Stat. Art. 342--903.[34] The Court concludes that the "in-state" language of Art. 342-903 Sec. 1(c) prohibits interstate branching.[35] Upon relocation of the Bank's main office to Texas, the Bank is only authorized to establish an interstate branch to the extent allowed under Texas law. The Court is not persuaded by the Comptroller's insubstantial argument that the absence of the in-state limitation in Section (1)(a) of Art. 342-903 means that

---

[34] Art. 342-903 provides, in relevant part, as follows:

> Art. 342-903. Branch Banking
>
> Sec. 1(a) A state bank may engage in the business of accepting demand deposits and making commercial loans at its principal banking office and at any other approved branch office location.
>
> . . . .
>
> (c) Branch offices may be established anywhere *in the state* on prior written approval of the Banking Commissioner.

Tex.Rev.Civ.Stat. art. 342-903 (1)(a) & (c) (West 1994) (emphasis added).

[35] The Court notes that Arts. 342-903 to 342-903a have been repealed. See 74th Leg., ch. 914, § 26(a). The effective repeal date was September 1, 1995, and thus the statute was in effect at the time of the Comptroller's March 8, 1995 Decision.

interstate branching is not prohibited under Texas law. See Decision at 14 n. 8.

56. Similarly, the Court also finds that the establishment of a branch was not permitted under Arkansas branching law.[36] The Arkansas branching provision for Arkansas-chartered banks is found in Ark.Code. Ann. §§ 23-3201202(a) & (b) (4).[37] Under Arkansas law, the Bank may establish a branch anywhere within the county "in which its principal banking office is located." Ark. Code Ann. § 23-32[-]1202)(b)(1).

57. Arkansas' branching statute must be construed in light of

---

[36] The Court addresses Arkansas law because the Comptroller based the approval of the new branch application under a faulty analysis of Arkansas law. In addition, the Court agrees with Plaintiff that this case involves the interests of two states -- Texas and Arkansas. The Bank's current operation effects the banking business of two states. See Oral Argument of Steven A. Fleckman.

[37] Ark. Code Ann. §§ 23-32-1202(a) & (b)(4) provides, in relevant part, as follows:

> 23-32-1202 Establishment of full service branch offices -- Locations
>
> (a) No banking institution shall engage in the business of banking at any location other than at a principal banking office or branch bank in this state except as otherwise permitted by law.
>
> . . . .
>
> (b)(1) A bank may establish full service branches and customer-bank communication terminals anywhere within the county in which the establishing bank's principal place of business is located.

Ark. Code Ann. §23-32-1202.

Section 36(c). Specifically, the Court must examine whether the Bank is "situated" in Arkansas, pursuant Section 36(c).

58. The Comptroller relies on Seattle Trust, 492 F.2d at 51, which held that a bank is situated in each state in which it has a main office *or* a branch. According to the Comptroller, in light of Seattle Trust, the Bank is "situated" in Miller County, Arkansas, by virtue of the Bank's retention of its existing branches in that county. Under this tortuous reasoning, the establishment of the new branch at the site of the former main office is allowed under the McFadden Act, and the state branching law of Arkansas which the McFadden Act incorporates.[38]

59. The Comptroller's reasoning is faulty. For the reasons already stated, the Bank was not authorized to retain its existing branches under the "implied" authority of Section 30. Thus, when the main office relocation application was granted, the Bank was (and is) no longer "situated" in Arkansas because it no longer had any lawful branches in Arkansas. Because the Bank is no longer situated in Arkansas, there is no authority to establish a new branch under Section 36(c).

60. The Court further concludes that Defendants' preemption argument is specious. The Defendants argue that even if state

---

[38] The new branch is ostensibly authorized under Arkansas law pursuant to Ark. Code Ann. § 23-32-1202(b)(1) which states that a bank can establish a branch anywhere "within the county in which the bank's principal place of business is located." According to the Comptroller's circular reasoning, under Seattle Trust, the Bank's "principal place of business" is either in Texarkana, Texas (where the main office is located by virtue of the relocation) *or* in Texarkana, Arkansas, because of the pre-existing branches that were allowed to be retained under the so-called "implied adjunct" to Section 30. Too many convoluted intellectual steps must be taken to reach the outcome the Comptroller has reached. In any event, the Bank is no longer "situated" in Arkansas.

law acted as a prohibition on the establishment of the branch at issue in this case, that law would be preempted because it would be in conflict with the authority granted to national banks under federal law in 12 U.S.C. §§ 30 and 36. Decision at 13; Comptroller's Motion at 24-25; Bank's Motion at 15-16. The Court has already determined that there is no "implied" authority for branch retention under Section 30. The Court determined this on the basis of *federal* law, and thus the preemption argument is irrelevant as applied to Section 30. Similarly, as to Section 36, the statute explicitly requires reference and adherence to state law. See Jackson v. First National Bank of Valdosta, 349 F.2d 71, 74 (5th Cir. 1965)(Section 36(c) "is explicit in providing that the substantive law of the state in which [a bank] . . . is located fixes the bounds of such [bank's] branching authority."). Therefore, there can be no conflict between state and federal law as to that Section.

V. CONCLUSION

1. Defendants' Motions to Dismiss or for Summary Judgment are **DENIED**. Plaintiff's Motion for Summary Judgment is **GRANTED**.

2. The March 8, 1995 and August 24, 1995 Decisions of the Comptroller are **SET ASIDE**. See 5 U.S.C. § 706(2).

3. Plaintiff is directed to submit a proposed Judgment by noon, May 31, 1996.

SO ORDERED.
DATED: May 22, 1996.

BAREFOOT SANDERS, JUDGE
UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS